IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 1272 of 1993

For Approval and Signature:

Hon'ble MR.JUSTICE M.C.PATEL
and
Hon'ble MR.JUSTICE A.L.DAVE

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

HUSEN ISHMAIL SINDHI

Versus

STATE OF GUJARAT

Appearance:

MR DEEPAK M SHAH for Appellant
THROUGH JAIL for Appellant
MR HL JANI, APP for Respondent No. 1

CORAM : MR.JUSTICE M.C.PATEL
and
MR.JUSTICE A.L.DAVE

Date of decision: 22/03/2002

ORAL JUDGEMENT

(Per : MR.JUSTICE A.L.DAVE)

1. The present appellant came to be convicted by the learned Additional Sessions Judge, Rajkot for the offence of murder in Sessions Case No.29 of 1990 by virtue of a judgment and order passed on August 19th, 1993. The appellant was charged to have committed murder of his wife Hanifaben by pouring kerosene and setting her to fire on February 14th, 1990 in their house situated in Mafatiapara, Jangleshwar of Rajkot. On conviction, he was sentenced to undergo imprisonment for life and to pay a fine of Rs.1,000/- and, in default, to undergo further imprisonment for a period of two months. Aggrieved by the said judgment and order, the present appeal is preferred.

2. The prosecution case is that deceased Hanifaben was niece of Hawaben Mamadbhai Sandhi. Hawaben received a message on 13th February, 1990 that Hanifaben is set to fire. She, therefore, rushed to the house of Hanifa and found her lying in a burnt condition. She inquired of Hanifa as to what had happened. She was orally informed by Hanifa that her husband had poured kerosene over her and had set her ablaze. She, therefore, requested the people who had gathered around to inform the police and took Hanifa to hospital. At the hospital, police arrived. Police constable Rahmatben was one of them. She inquired of Hanifaben as to what had happened and Hanifa told her that her husband had set her ablaze after pouring kerosene. On the basis of this, a complaint was recorded, offence was registered and investigated. Hanifa succumbed to the injuries at about 4.00 a.m. in the early morning hours. During this course, the Executive Magistrate was summoned for recording the dying declaration. The Executive Magistrate arrived and recorded the dying declaration of the deceased. The doctor certified that the patient was in good state of health for giving dying declaration.

2.1 After considering the evidence that was collected by the investigating agency, the Investigating Officer filed a chargesheet in the Court of Chief Judicial Magistrate, Rajkot. The Chief Judicial Magistrate, Rajkot, after following the procedure, committed the case to the Court of Sessions.

3. Learned Additional Sessions Judge framed charge at Exh.1. The accused appellant pleaded not guilty to the charge and claimed to be tried.

4. After considering the evidence led by the

prosecution, the learned Additional Sessions Judge came to the conclusion that the prosecution could successfully prove the charge and convicted him for the offence, as stated above. Hence, this appeal.

5. Learned advocate Mr.D.M. Shah appearing for the appellant has taken us through the record and proceedings. He has tried to indicate certain discrepancies in the prosecution evidence and frivolously tried to advance the cause of the appellant for allowing the appeal and setting aside the conviction. However, he could not demolish the evidence of Hawaben Mamadbhai before whom the deceased gave oral dying declaration nor could he demolish the evidence of Khimjibhai Govindbhai Ujariya, Executive Magistrate who had recorded the dying declaration (Exh.62).

6. The appeal is opposed to by the learned Additional PP Mr. Jani.

7. We have gone through the record and proceedings and have considered the contentions raised before us in light of the evidence on record.

8. At the outset, it may be noted that there is no doubt that deceased Hanifa died an unnatural death due to extensive burns. The question that requires to be considered is whether the prosecution could be said to have proved that it was the appellant who caused the burns injury which took its toll.

9. The evidence of Bai Hawaben is at Exh.46. She clearly states that on receiving the message about Hanifa having been burnt, she rushed to the spot and inquired of Hanifa as to what had happened and she, in clear terms, said that her son-in-law i.e. the present appellant poured kerosene over her, set her ablaze and then went away. Hawaben immediately summoned the police and took the deceased to the hospital. There police people arrived including one Rahmatben before whom deceased Hanifaben again declared the same thing. This witness has been cross-examined at length and various questions on various aspects for testing her veracity has been put. But she sticks to her version about the dying declaration. An attempt is made to show that the deceased was not in a position to give a dying declaration which is denied by the witness and the suggestions rest falsified by virtue of an endorsement made by the Medical Officer in the margin of the dying declaration (Exh.62).

10. There is evidence of Govindbhai Motibhai (Exh.54). He was on his hospital duty on 14th February, 1990. According to him, the deceased was brought to the hospital in a burnt condition and, on inquiry, she said that Hussainbhai, Musalman, aged 20 years, residing at Jangleshwar, Mafatiapara, Rajkot (her husband) had, after beating her and pouring kerosene, set her ablaze and had run away and, therefore, she is admitted in the hospital. In cross-examination, he sticks to his version and denies the suggestion that the information was given by Hawaben and not Hanifaben. Nothing material comes out of the cross-examination to shake the evidence.

11. Witness Khimjibhai Govindbhai (Exh.61) is the Executive Magistrate who has recorded the dying declaration (Exh.62). He says that he was working as Deputy Mamlatdar in Rajkot Municipal Corporation. On 14th February, 1990 at about 2.30 hours, he received a message from Police Inspector 'B' Division for recording the dying declaration of Hanifaben, wife of Hussainbhai of Jangleshwar. The yadi contained an endorsement that the patient is conscious. On receiving the yadi, he went to the hospital and then to the Burns Ward. He called for the doctor through the hospital personnel on duty. On arrival of the doctor, they went to the patient, asked the relatives to leave the room and only the doctor and the witness remained with the patient. He started recording the dying declaration at 2.50 hours in question answer form wherein deceased Hanifaben clearly stated that her husband had poured kerosene and set her ablaze. She said that only herself and her husband were at home. She also said that her husband did not work. She had to work and, therefore, she asked him to work as a result of which the incident occurred. A number of questions were put to this witness to verify as to whether he is aware of the topography of the hospital and to ascertain whether the dying declaration which was recorded was that of the deceased only. However, the witness has remained unshaken. Certain questions were put about the condition of the patient at the time when he went to record the statement. However, the fact remains that in the dying declaration (Exh.62), the doctor has put an endorsement that the patient was conscious throughout the dying declaration and, therefore, the question put to this witness do not advance the case of the appellant anymore.

12. The prosecution has examined other witnesses and has adduced other evidence. However, in our opinion, the conviction has been rightly recorded in light of the

above discussed strong, dependable and independent evidence. We do not see any reason to interfere with the judgment and order impugned herein. We find that the dying declaration cannot be doubted for any reason whatsoever. It is recorded by an Executive Magistrate with an endorsement of a Medical Officer and is consistent with the oral dying declaration made before Hawaben and Govindbhai. All these aspects fully convince us about the genuineness and trustworthiness of the dying declaration. The appeal, therefore, deserves to be dismissed and the same is dismissed.

(M.C. Patel, J.)

(A.L. Dave, J.)

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